Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of

Petition for Declaratory Ruling to Declare Unlawful Certain RFP Practices by Ameritech

CC Docket No. 98-62

COMMENTS OF SBC COMMUNICATIONS INC.

Pursuant to the Commission's Public Notice (DA 98-849) released May 5, 1998, SBC Communications Inc. ("SBC") hereby submits its comments in the above-entitled matter on behalf of itself and its affiliates. In its Petition, Sprint Communications Company, L.P. ("Sprint") asks the Commission to declare certain practices of Ameritech to be violative of sections 271(a) and 251(g) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 ("the Act"). In doing so, Sprint relies almost entirely upon a definition of the provision of interLATA telecommunications services that evolved under the AT&T Modification of Final Judgment ("MFJ"), without discussing the definitions of "interLATA service," "telecommunications," and "telecommunications service" found in the Act. Furthermore, Sprint barely mentions the

FCC's own determination on this issue, made in the Non-Accounting Safeguards Order,[1] and Sprint completely ignores the FCC's determination, in the context of alarm monitoring service, regarding the relationship between "marketing" a service and "provisioning" that service.[2]

I. SPRINT'S RELIANCE ON MFJ LINE OF BUSINESS RESTRICTIONS IS MISPLACED

In its petition, Sprint argues that Ameritech's teaming activities, designed to provide customers with a single point of contact, one-stop shopping experience for their telecommunications needs, violates section 271(a) of the Act because, Sprint alleges, Ameritech's participation in those activities "plainly puts Ameritech in the business of providing interLATA services." Sprint Petition at 3. In reaching this conclusion, Sprint relies on rulings of "the MFJ court . . . more than a decade ago." Id. Therein lies the weakness in Sprint's position. Ameritech's, and the other BOCs', activities are today subject to the Act, not to the rulings of the MFJ court. Section 601(a) of the Telecommunications Act of 1996.

Section 271 of the Act establishes today's counterpart to the MFJ's interLATA line-of-business restriction, which was what the MFJ court was interpreting in the ruling cited by Sprint. In creating section 271, however, Congress did not simply restate the MFJ's interLATA line-of-business restriction, with all of its attendant

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[1] In the Matter of Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, CC Dkt. No. 96-149, First Report and Order, 11 FCC Rcd 21905, ¶293 (1996) ("Non-Accounting Safeguards Order").

[2] In the Matter of Implementation of Telecommunications Act of 1996: Telemessaging, Electronic Publishing and Alarm Monitoring Services, CC Dkt. No. 96-152, Second Report and Order, 12 FCC Rcd 3824, (1997) ("Alarm Monitoring Order").

interpretation. Rather, Congress enacted the interLATA restriction that it believed was appropriate in today's environment. That this restriction is not the same as the MFJ restriction is apparent both from the fact that Congress included "exceptions" to the interLATA prohibition in sections 271(a), (f), and (g), and by the definitions of interLATA services, telecommunications, and telecommunications service upon which section 271(a)'s prohibition is based. If Congress had intended to adopt the MFJ's definition of prohibited interLATA services, it would have done so. But it did not.

BOCs were prohibited under the MFJ from providing "interexchange telecommunications services." MFJ, section II.D.1. The MFJ defined "interexchange telecommunications" as "telecommunications between a point or points located in" one LATA and "a point or points located in" another LATA. MFJ, section IV.K. "Telecommunications" was defined as "transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent or received, while "telecommunications services" were defined as the offering for hire of telecommunications facilities, or of telecommunications by means of such facilities." MFJ, section IV.P. MFJ. section IV.O. Thus, what the MFJ prohibited was the offering for hire of the transmission of information of a user's choosing between points in different LATAs.

That is not what is prohibited by the Act. While the definitions in the Act are similar to those in the MFJ, Congress used them differently in creating the Act's interLATA prohibition. The Act prohibits BOCs from providing "interLATA services," which are defined as "telecommunications" between points in different LATAs. Section 153(21). "Telecommunications" are the "transmission, between or among points

specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." Section 153(43). "Telecommunications service" is also defined in the Act, as "the offering of telecommunications for a fee directly to the public . . . regardless of the facilities used." Section 153(46). This definition of "telecommunications service" is quite similar to the definition of "telecommunications services" in the MFJ, but instead of defining "interLATA services" in terms of "telecommunications service," which would have mirrored the MFJ definition, Congress defined "interLATA services in terms of "telecommunications."

Furthermore, if Congress had intended the interLATA line-of-business restriction to mirror the MFJ restriction, it could easily have done so, as it did with respect to the equal access and nondiscrimination obligations addressed in section 251(g). There Congress specifically stated that local exchange carriers continue to be subject to the obligations that existed under the MFJ prior to enactment of the Act.

Because Congress did not adopt the MFJ's interLATA line-of-business restriction lock, stock, and barrel, Sprint's reliance on MFJ court rulings is misplaced; the Commission must look to what Congress said, not what the MFJ court said. And, in fact, the Commission has already done so in its Non-Accounting Safeguards Order. There, the Commission recognized that BOCs are not restricted by the Act from "teaming" with an unaffiliated entity "to provide interLATA services prior to receiving section 271 approval." Non-Accounting Safeguards Order at ¶293. The Commission noted only that any such teaming arrangement by a BOC would be subject to the equal access and nondiscrimination requirements of section 251(g). Id. Sprint gives short shrift to this Commission determination, essentially simply acknowledging its existence and quoting

the language regarding the equal access requirement, followed by a statement that Ameritech "has wholly ignored" this determination. Sprint Petition at 8. However, it is really Sprint that ignores it. Sprint makes no attempt to reconcile its claim that such "teaming" arrangements violate section 271(a) with the Commission's determination that such "teaming" may indeed occur. Nor does Sprint expend more than a conclusory sentence of two to support its claim of violation of section 251(g).[3]

II. THE COMMISSION HAS RECOGNIZED THAT MARKETING AND SALES ACTIVITIES DO NOT PER SE CONSTITUTE PROVISION OF THE UNDERLYING SERVICE

The Commission has considered the question of whether a BOC's "participation in sales agency, marketing, and/or various compensation arrangements" related to a service provided by an unaffiliated entity constitutes the provision by the BOC of that underlying service. The Commission concluded that it does not. Sprint's petition completely ignores this prior examination of this question.[4]

In its Alarm Monitoring Order, the Commission examined the question of whether a BOC's engaging in marketing activities related to alarm monitoring services caused the BOC to be impermissibly engaged in the provision of the alarm monitoring service, and concluded that such activities were not per se the equivalent of provision of

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[3] SBC recognizes that the Commission has not examined the specifics of the Ameritech teaming arrangements, and that the Commission may wish to do so. However, even without doing so the Commission can reject Sprint's petition because that petition is not based on the current law.

[4] Although the Commission's consideration of this issue related to activities associated with the provision of alarm monitoring service and not interLATA service, the Commission's rationale applies equally to the provision of interLATA service. Each service is one that the BOCs are prohibited from providing, and in each instance the question turns on the meaning of "provision" of the prohibited service.

the service.[5] Alarm Monitoring Order at ¶37. In doing so, the Commission rejected a suggestion that it should "flatly prohibit BOCs from entering into arrangements to act as sales agents on behalf of alarm monitoring service providers or to market on behalf of or in conjunction with, alarm monitoring services providers," concluding that the Act did not, "by its terms, prohibit a BOC from acting as a sales agent or marketing alarm monitoring services." Id.

The same conclusion is true with regard to interLATA services, i.e., by its terms the Act does not prohibit BOCs from acting as sales agents for, or entering into marketing arrangements with, providers of interLATA services. Rather, section 271 states that BOCs may not "provide interLATA services, except as provided in this section." As discussed above, "interLATA services" are defined in terms of "telecommunications" between points in different LATAs, not in terms of "telecommunications service". Section 153(21). "Telecommunications" is the "transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received, while "telecommunications service" is the offering of telecommunications for a fee to the public." Section 153(43), (46). Thus, BOCs are prohibited from providing the transmission of information of the user's choosing between or among points specified by

[5] The Commission also stated that it would examine sales agency and marketing arrangements on a case-by-case basis to determine whether in a specific instance they cause the BOC to become so intertwined with the alarm service provider's service as to be engaged in the provision of the alarm monitoring service. Alarm Monitoring Order at ¶38.

the user and located in different LATAs, not from offering such transmission to the public. Engaging in marketing and sales activities related to interLATA service is not the provision of such transmission, and thus is not prohibited by section 271. Furthermore, Congress recognized that marketing and sales of a service is not the equivalent of provision of that service, by permitting BOCs to market and sell the interLATA services of their interLATA affiliate, once section 271 authorization is received, even though the BOCs are prohibited from providing such interLATA service. Section 272(g)(2).

The Commission applied its conclusions in the Alarm Monitoring Order in reviewing Southwestern Bell Telephone Company's ("SWBT's") CEI plan for its Security Service.[6] In its order approving SWBT's CEI plan, the Commission examined SWBT's proposed activities, which included marketing and selling to end users the alarm monitoring service of an unaffiliated provider, presenting the provider's contract to the end user for signature, and receiving a commission payment for sales of the unaffiliated provider's service. The Commission concluded that those activities did not cause SWBT to be engaged in the provision of alarm monitoring service. SWBT CEI Plan Order at ¶¶33-42. If a BOC engages in similar activities relating to the interLATA service of an unaffiliated provider, the same conclusion should be reached – the BOC would not be engaged in the provision of the prohibited interLATA service.

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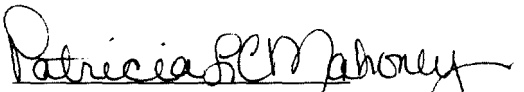
[6] In the Matter of Southwestern Bell Telephone Company's Comparably Efficient Interconnection Plan for Security Service, CC Dkt. No. 85-229, Order, 12 FCC Rcd. 6496 (1997) ("SWBT CEI Plan Order").

III. CONCLUSION

Sprint has attempted to persuade the Commission that the Act's interLATA prohibition is governed by rulings of the MFJ court made more than a decade ago. There is no support in the Act for this interpretation. Congress did not, as it did with equal access requirements, simply carry forward into the Act the MFJ's interLATA prohibition with all of its associated interpretation. Congress enacted its own interLATA prohibition, which does not prohibit a BOC from marketing and selling interLATA services of an unaffiliated provider, so long as in doing so the BOC acts consistently with section 251(g)'s equal access and nondiscrimination requirements. It is Congress' prohibition, not the MFJ's, that the Commission must enforce. While the Commission may well wish to examine such arrangements by a BOC on a case-by-case basis, it can, and should reject Sprint's petition and find, as it did with respect to alarm monitoring service, that marketing and sales activities related to interLATA service of an unaffiliated provider do not per se constitute the provision of the underlying interLATA service.

Respectfully submitted,

SBC Communications Inc.



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CERTIFICATE OF SERVICE

I, Evelyn De Jesus, hereby certify that on this 4th day of June, 1998 a true and correct copy of the foregoing "COMMENTS OF SBC COMMUNICATIONS INC." in CC Docket 98-62 was sent by United States first class mail, postage prepaid, to the parties on the attached list.

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